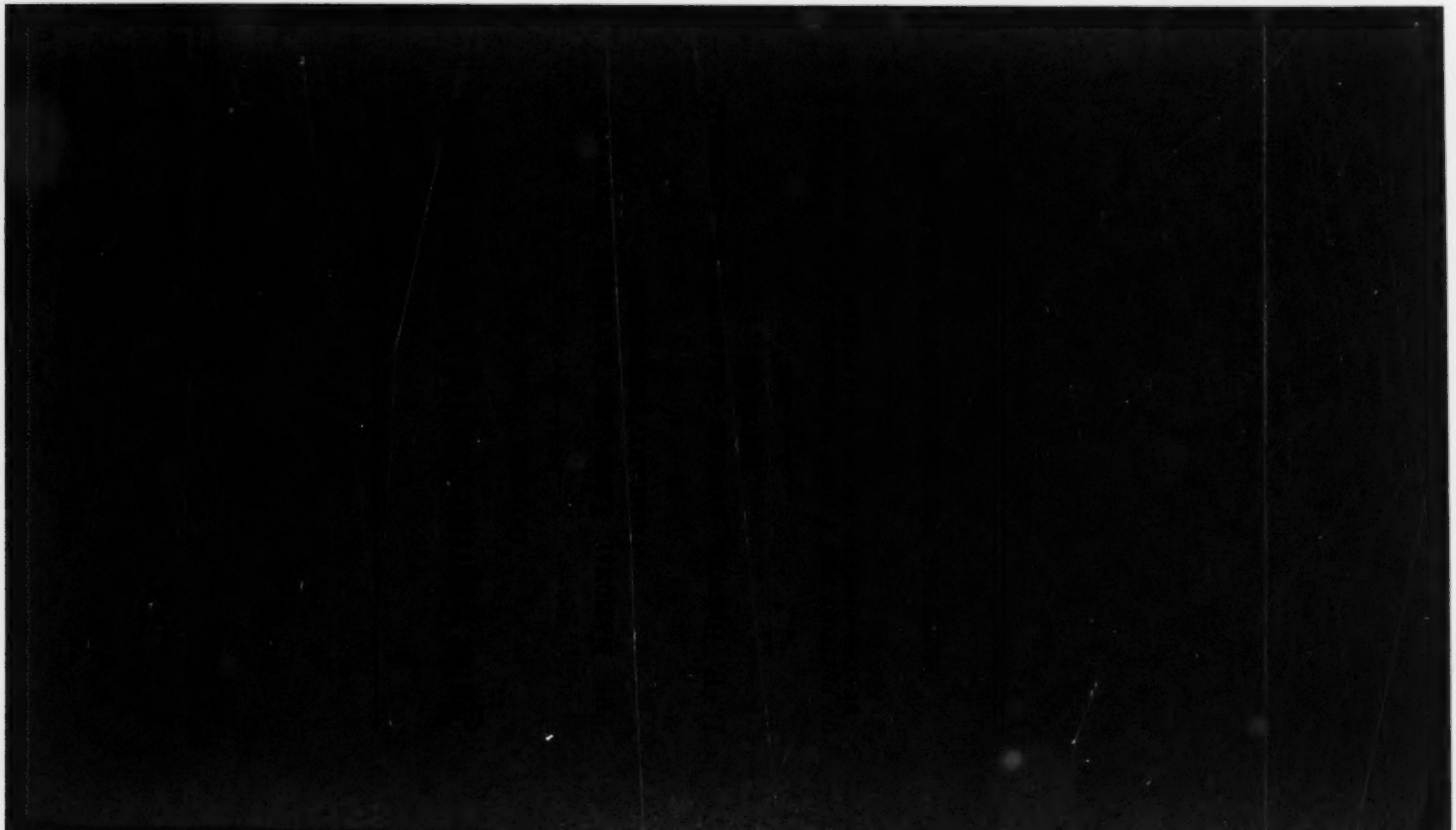

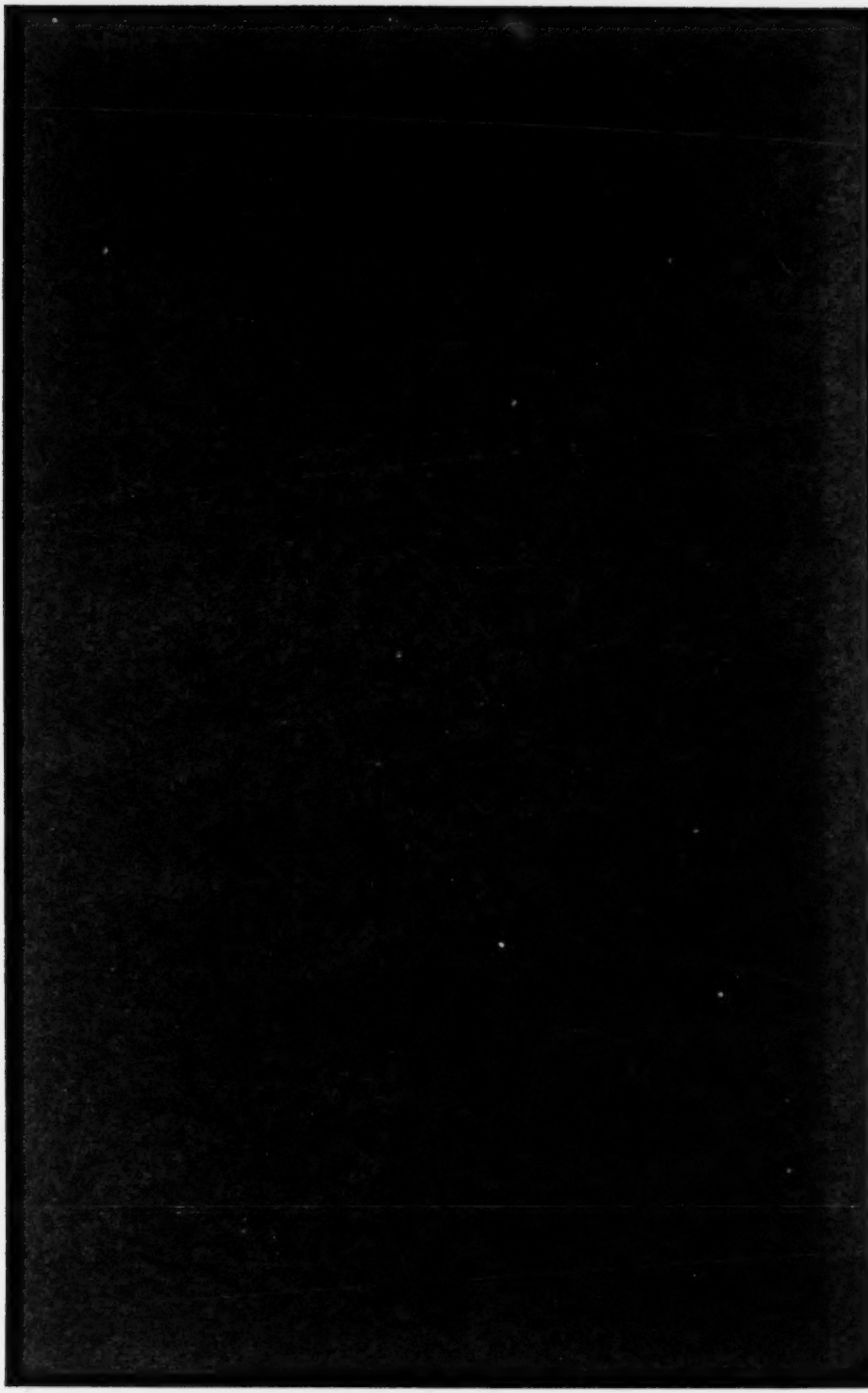

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 278

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, PETITIONER

v.

L. P. BREWER, FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 80–98) is not officially reported. The opinion of the Circuit Court of Appeals (R. 105–110) is reported at 119 F. (2d) 313.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 17, 1941 (R. 105). The petition for a writ of certiorari was filed July 15,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

On December 13, 1921, taxpayer paid $17,000 as the last of four equal instalments due under its income and excess-profits tax return for the calendar year 1920. On June 12, 1925, on assessment by the Commissioner, the taxpayer paid additional taxes of $249.40 for 1920. A claim for refund was rejected in 1926. By the action instituted on June 7, 1930, taxpayer now seeks to recover the sum of $15,000, plus interest, of the income and excess-profits taxes for 1920.

The question is whether the five-year limitation of Section 1113 (a) of the Revenue Act of 1926 upon suits for the recovery of taxes runs from taxpayer's payment on December 13, 1921, or from taxpayer's additional payment on June 10, 1925.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 11–17.

STATEMENT

This is an action filed in the district court on June 7, 1930 (R. 5, 90), in which, as reduced by an amended petition filed March 12, 1934 (R. 19–63), recovery is sought of the sum of $15,372.69 plus interest from December 13, 1921 (R. 26–27),

of the income and excess-profits taxes paid by the taxpayer for the year 1920. Jury trial was waived (R. 66, 80); the case was tried on a stipulation of facts (R. 66–77), adopted by the court as its findings (R. 80–91). These findings may be summarized in chronological order as follows:

March 11, 1921: taxpayer filed its income and excess-profits tax return showing a tax due of $70,698.13 for the calendar year 1920 (R. 67).

December 13, 1921: taxpayer paid $17,674.53, its final instalment of the tax due for the year 1920 (R. 67).

December 29, 1924: the Commissioner, after an audit for the years 1919 and 1920, notified taxpayer by letter (Ex. A; R. 28–37) of his determination that taxpayer owed additional income and excess-profits taxes of $72,265.33 for 1919 and $54,306.39 for 1920.

April 4, 1925: the Commissioner, after further audit, notified taxpayer by letter (Ex. B, R. 37–40) of the reduction of the asserted additional tax for 1920 from $54,306.39 to $249.40.

April 16, 1925: taxpayer filed with the Commissioner a waiver (Ex. C; R. 41–42) of its right to appeal to the Board of Tax Appeals and consented to the immediate assessment of the additional tax.

June 12, 1925: after assessment by the Commissioner, taxpayer paid the additional taxes of $72,265.33 for 1919 and $249.40 for 1920 (R. 68–69).

June 10, 1925: taxpayer filed his claim for refund (Ex. D, R. 42–45) of the full amount of the additional tax paid on June 12, 1925.

January 9, 1926: the Commissioner rejected this claim for refund (R. 69).

February 2, 1927: taxpayer filed a further claim for refund (Ex. E, R. 46–49) of the additional tax paid on June 12, 1925. The grounds asserted for the refund were identical to the grounds asserted for the claim made on July 10, 1925.

April 12, 1927: the Commissioner rejected this second claim (R. 69–71).

June 7, 1930: taxpayer instituted this action in the district court (R. 5).

October 14, 1931: the Commissioner issued to the taxpayer a certificate of overassessment for the year 1920. The certificate disclosed an overassessment for 1920 of $15,622.19, but it showed also that of this overassessment only $249.40 was "allowable." The balance of the overassessment, $15,372.69, was stated to be barred by the statute of limitations (Ex. J, R. 59–63).[1]

The parties stipulated that the taxpayer was entitled to recover the $15,372.69 balance of the taxes paid by it on December 13, 1921, with interest thereon from that date, *provided that* the suit

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[1] The sum of $249.40, plus interest, was refunded on November 11, 1931; the balance of the overassessment, recovery of which is sought in this action by the amended petition, has not been refunded (R. 75–76).

was brought within the time limited by Section 1113 of the Revenue Act of 1926, *and that* refund to or recovery by the taxpayer of that amount was not barred by the statute of limitations (R. 76–77). These two grounds had been pleaded as affirmative defenses in the Collector's answer (R. 64).

The district court held that the five year limitation upon bringing suit did not begin to run until taxpayer's payment on June 12, 1925, of the additional tax of $249.40 and that therefore the suit was not barred under Section 1113 of the Revenue Act[2] (R. 96–98). The district court entered judgment (R. 99) for the taxpayer for $15,372.69, with interest from December 13, 1921 (R. 90).

The court below reversed the decision of the district court and held that the instant suit was barred because brought more than two years after the rejection of the claim for refund and more than five years after the payment of the tax sought to be recovered (R. 105–110).

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[2] To establish that the suit was timely under the statute as one begun within two years of rejection of the claim for refund, the taxpayer contended in the district court that there had been an administrative reopening of its claim for refund by the Commissioner and a subsequent rejection within two years of the institution of the suit. The district court held that there had been no reopening (R. 94–96; see also R. 73–75). The contention was not presented to the court below, and is no longer pressed.

ARGUMENT

Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, Appendix, *infra*, p. 11, prohibits the institution of suits for the recovery of any internal revenue tax after the expiration of five years from the date of payment of "such tax." The sole question presented here is whether this suit was instituted within five years of the payment of the tax for which recovery is sought.[3]

Taxpayer seeks to recover the sum of $15,372.69, which was paid by him on December 13, 1921, as a part of the last instalment of its liability for income and profits taxes for the year 1920 reported by it on its return. It contends that its suit is not barred because the five-year limitation runs not from December 13, 1921, but from June 12, 1925, when he paid an additional tax of $249.40 for 1920, since its 1920 income and profits tax was not "paid" until the date of this additional payment.[4]

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[3] Section 1113 (a) imposes the five-year limitation unless the suit is begun within two years after disallowance of a claim for refund. No claim is here made that taxpayer's suit can qualify under the latter provision.

[4] But for purposes of interest, petitioner advances 1921 as the date of payment, since petitioner seeks interest from December 13, 1921 (R. 26–27). It is true that interest is allowable from the date of actual payment under section 1019 of the Revenue Act of 1924, c. 234, 43 Stat. 253 (allowing interest "from the date such tax * * * was paid.") *Blair* v. *Birkenstock*, 271 U. S. 348. But if the date of payment of "such tax" is construed to mean the date of

Literal compliance with the conditions imposed upon the maintenance of suits for the recovery of taxes is essential. *Tucker* v. *Alexander,* 275 U. S. 228, 231; *Rock Island &c. R. R.* v. *United States,* 254 U. S. 141, 143. For taxpayer to lift itself by its own bootstraps by timely suit for the recovery of $249.40 paid on June 12, 1925, so as to make timely the same suit for recovery of $15,372.69 paid on December 13, 1921, almost nine years before institution of the suit, is scarcely "literal compliance" with the condition that suit be instituted within five years of the payment of the tax or sum sought to be recovered.

Both the statute and settled judicial principles support the conclusion of the court below that the date of payment of the tax is the date of actual payment of the "specific sum sought to be recovered" (R. 108) and that recovery is to be limited to the portion of the tax or sum actually paid within the designated period before suit is brought. See *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 531; *Pink* v. *United States,* 105 F. (2d) 183, 186 (C. C. A. 2); *United States* v. *Bibb Mfg. Co.,* 73 F. (2d) 367 (C. C. A. 5); see also *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *Blair* v. *Birkenstock,* 271 U. S. 348.[5] But

actual payment for interest purposes, the almost identical words should be similarly construed for purposes of the limitation upon institution of suit.

[5] Petitioner suggests (Pet. 9, 11) that the rule followed in the decision below imposes severe hardships since, it is

taxpayer contends that the decision of the court below is in conflict with *United States* v. *A. S. Kreider Co.*, decided by this Court May 26, 1941, not yet officially reported, and with the decision of the Court of Claims in *Hills* v. *United States*, 50 F. (2d) 302, opinion modified, 55 F. (2d) 1001.

Neither of these cases, however, is in conflict with the decision of the court below. Petitioner's claim of conflict with the *Kreider* case is based upon a footnote in that opinion in which this Court, in dealing with a wholly different issue, assumed, for the purpose of that case, without deciding, that the period of limitation for the institution of a suit for the recovery of a tax does not begin to run until the last payment of addi-

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contended, petitioner had no cause of action until payment of the additional tax in 1925. But, to obtain a refund either of the original or the additional tax, petitioner is required first to file a claim for refund within the proper period after the date of the payment of the portion of the tax of which refund is sought. Section 284 (b) (2) of the Revenue Act of 1926, Appendix, *infra*, p. 13. Assuming that petitioner filed a timely claim to reach the $15,372.09 portion of the original tax, a cause of action upon which a suit could be based arose upon the denial of its claim on January 9, 1926. This cause of action was enforceable by suit from January 9, 1926, until the expiration of five years from the date of payment, i. e., until December 13, 1926, or until the expiration of two years from the date of rejection of the claim, i. e., until January 9, 1928, whichever of the two periods expired later. Section 1113 (a) of the Revenue Act of 1926, Appendix, *infra*, p. 11. But petitioner allowed both periods to expire without bringing suit.

tional tax.[6] Such an assumption cannot amount to a holding with which the decision below can be in conflict. Nor is there conflict with the *Hills* case, *supra*. That case involved suit for recovery of estate taxes, not income or profits taxes. The clear distinction, resulting from differing statutory provisions peculiar to each, between suits for the recovery of estate taxes and for the recovery of income and profits taxes was recognized not only by the court below but by the Court of Claims in the *Hills* case itself (50 F. (2d), at pp. 305, 306; 55 F. (2d), at pp. 1002–1003).[7]

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[6] The *Kreider* case decided that in actions for the recovery of taxes the specific five-year limitation of section 1113 of the Revenue Act of 1926 controlled over the general six-year provision of the Tucker Act, c. 359, 24 Stat. 505, later incorporated in section 24 (20) of the Judicial Code. Resolution of the issue involved in the instant case was unnecessary to the decision of the *Kreider* case, but the assumption made by this court posed the central question before it in its barest and clearest form.

[7] The same distinction applies to the other cases cited by petitioner (Pet. 17). All follow the *Hills* case and involved estate taxes. In respect of income and profits taxes, section 281 of the Revenue Act of 1924 contained provisions to prevent a late payment of a portion of a tax from extending the time for the entire tax payment. S. Rep. No. 398, 68th Cong., 1st sess., p. 33 (1939—1 Cum. Bull. (Part 2) 266, 289); H. Rep. No. 844, 68th Cong., 1st sess., pp. 24–25 (1939—1 Cum. Bull. (Part 2) 300, 308). This provision was carried forward, in respect of income and profits taxes, to the Revenue Act of 1926 (section 284 (b) (2), Appendix, *infra*, p. 13), and to subsequent revenue acts, while no corresponding provision relating to estate taxes was enacted until the Revenue Act of 1932, c. 209, 47 Stat. 169, sec. 810, after the decision in the *Hills* case.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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AUGUST 1941.